

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 97-523

November 14, 1997

CENTRAL MAINE POWER COMPANY
Divestiture of Generation
Assets

ORDER ON
RECONSIDERATION
OF DISCOVERY RULINGS

WELCH, Chairman; NUGENT and HUNT, Commissioners

I. SUMMARY

Central Maine Power Company (CMP) seeks reconsideration of certain discovery rulings made by the Hearing Examiner. We grant reconsideration and reverse most of the Examiner's discovery rulings for which CMP seeks reconsideration.

II. BACKGROUND

After CMP filed objections to more than 40 data requests and the IECG moved to compel answers to its data requests, the Examiner held a hearing on October 29, 1997 to resolve the discovery dispute. The Examiner ruled from the bench, granting IECG's Motion to Compel for a majority of the data requests and denying IECG's Motion for some. The Examiner also ordered CMP to respond to the Examiner's Data Requests to which CMP had objected.

On November 3, 1997, CMP sought reconsideration of the Examiner's ruling compelling discovery as to the following data requests:

IECG-01-23: Please provide a copy of all studies, analysis, documents, internal memorandums, or electronic communications in CMP's possession relating to or discussing the potential effect on the market value of CMP's generating assets of the possible short term and/or permanent shutdown of nuclear facilities in New England and New Brunswick other than Maine Yankee.

IECG-02-10: Please provide a copy of all written or electronic communications between CMP or its agents and Dillon Read concerning the value of CMP's generation, the value of other utility generation or the RFP.

- IECG-02-13: *Please provide a copy of any directions or criteria employed by CMP and/or Dillon Read in accepting or rejecting initial responses to the RFP.*¹ Please provide a copy of any report concerning the initial responses prepared by CMP and/or Dillon Read.
- IECG-02-24: Please provide copies of any analyses prepared by or for CMP, or in CMP's possession, which discuss or analyze the annual revenue affect on CMP's T&D system of alternative CMP generation sale scenarios.
- IECG-02-29: Please provide a copy of each analysis or discussion in CMP's possession of the bottom line effect, tax effect or shareholder/dividend effect of alternative CMP generation sales scenarios.
- IECG-02-26: Please provide the various projections of the cost of energy and/or capacity for part or all of the period 1997-2015 upon which CMP has relied since 1994 in making decisions such as the sale of generating units, the decisions to sustain Maine Yankee and the decision to close Maine Yankee.
- EX-02-07: If not provided in the Company's response to Examiner's Data Request No. 1, please indicate how many Phase II bidders CMP has identified for each business unit. Identify whether bidders on a particular business unit also bid on other units, and identify the other units. Please also provide a copy of all material provided to the Phase II bidders.

¹ CMP did not object to the italicized portion of this request.

EX-04-04:² With respect to the Company's response to EX-02-02,³ please:

- a) confirm that the Company's response reflects the entirety of analyses, studies, recommendations or any other material relevant to CMP's divestiture provided by Dillon Read; or
- b) supplement the response to EX-02-02.

CMP objected to answering these data requests on two grounds: first, some of the data requests seek information regarding analysis of the market value of CMP's generation assets and as such are beyond the scope of the proceeding and are not relevant or likely to lead to admissible evidence in this proceeding; second, some data requests seek information regarding the Phase II bids or information or analysis about the Phase I bids, which are only marginally relevant to this proceeding and whose disclosure creates significant risks of harming the bid process. An oral argument was held on November 4, 1997 in which IECG and other parties responded to CMP's reconsideration request.

²The Hearing Examiner was not asked to rule on CMP's objections to EX-04-04 because CMP received that data request on October 27 and, as of the hearing, had not yet filed its objection. Unlike EX-02-02, which requests information provided by Dillon Read on the CMP bid process, EX-04-04 (which purports to follow-up EX-02-02) requests "the entirety of analyses ... relevant to CMP's divestiture provided by Dillon Read." This data request is sufficiently broad to encompass all reports prepared by Dillon Read concerning the initial bid proposals and market value analysis and is therefore objectionable on the same grounds as the similar questions propounded by IECG and in EX-02-07. CMP filed an objection to EX-04-04 and, although that objection has not been ruled on by the Examiner, CMP includes that data request in this appeal because the Examiner's rulings on similar requests permit the Commission to conclude that the Examiner would require CMP to respond to EX-04-04. Under these circumstances, CMP includes EX-04-04 here for the Commission's consideration notwithstanding that the Examiner has not ruled on that objection.

³ EX-02-02 requested: "Please provide all analyses, studies, recommendations or other material provided by Dillon Read to CMP regarding divestiture processes and timing generally, or CMP-specific."

III. DECISION

Discovery may be obtained of any matter that is relevant to the subject matter involved in the proceeding or that is reasonably calculated to lead to the discovery of admissible evidence. M.R. Civ. P. 26(b)(1) and MPUC rules, ch. 110, § 822(b). However, by Rule 26(c) of the Rules of Civil Procedure we may, upon showing of good cause, protect a party by ordering that discovery not be had or that discovery be had only on specified terms and conditions. Moreover, in denying a Motion to Compel made pursuant to Rule 37 as done by IECG in this proceeding, we may make such protective order as we would have been empowered to make on a motion made pursuant to Rule 26(c).

In deciding discovery issues in this divestiture plan proceeding, we know that many of the same issues that arise in this proceeding will also arise in the sale of assets approval proceeding. For instance, some of the disputed requests are relevant to market power issues. It is conceivable that market power analysis may be relevant to deciding the reasonableness of the type of divestiture plan. Market power analysis will, however, be more relevant after the winner or winners of the bid process are chosen and the sale of assets is before us. It is certain in any event that market power issues will not be resolved finally in the plan proceeding and will be available to be raised by any party in the sale approval docket.

Weighing against allowing discovery of marginally relevant information is the harm that could occur from the disclosure of the information. We find that the harm from disclosure of the disputed information is substantial. The public disclosure of bids or the number of bidders could cause grave harm, likely resulting in asset sale prices being adversely affected. While the public disclosure of CMP's or other market value analysis would likely not cause as much harm, there is still a significant chance that bid prices would be adversely affected. In general, we find that balancing the need for discovery with the harm that may result from the discovery leads us to conclude that CMP should be protected from the discovery of information about the results of the bid process and about CMP's or other market value analysis. We now turn to each of the disputed requests.

1. IECG-01-23

The request is relevant to market power issues and arguably to the timing of divestiture. As discussed above, however, we decide that the decision in this docket will not be final on market power issues. Performing a balancing between the need for discovery in this case and the potential harm from

requiring discovery, we conclude that CMP should not be compelled to answer IECG-01-23.

2. IECG-02-10

We view information concerning CMP or Dillon Read's analysis of the market value of CMP's assets to be sensitive. Public disclosure will be detrimental to the interest of both ratepayers and shareholders that maximum value is received through divestiture. Because of the sensitive nature of this information we decide to preclude discovery until after the bid process.

3. IECG-02-13

We view information about the initial responses to the Phase I bids to be extremely sensitive. We decide that the information about the initial bid responses is not discoverable at this time. This information will be discoverable after the bid process is complete and CMP seeks approval of the sale to the winning bidder or bidders.

4. IECG-02-24 and IECG-02-29

These requests that seek analysis of alternative sale scenarios are relevant to the question of the design of CMP's plan such as the packaging of the assets into particular business units. We also find that the information requested is less sensitive than the value analysis or bid analysis asked for in the questions above, provided that any analysis of market valuation of the assets such as asked in IECG -02-10 is redacted.

Protection from public disclosure of this information is still warranted, with access restricted to the Commission, its advisors and consultants, the OPA and its consultants and counsel of intervenors. CMP should provide a draft protective order to the Hearing Examiner.

5. IECG-02-26

The projections for the price of energy and capacity for the next 18 years are more relevant to the sale of asset approval docket than the plan approval proceeding. Moreover, it is unfair to give this information to IECG because of its potential dealings with CMP between now and the date of retail access. These projections are not discoverable at this time.

6. Examiners-02-07

This question relates to information about Phase II bidders. As described above, this information is extremely sensitive and the gravity of harm of any public disclosure is severe. We find that discovery should not be had until after the bid process is over and the sale of asset cases before us.

7. Examiners-04-04

To the extent that reports sought in this request fall into the categories of information asked for in Examiners-02-07 or IECG-02-13, then the information is not discoverable at this time. To the extent that the information sought consists of reports or general analyses of the bidding process or timing and the like, the information is discoverable.

Accordingly, on reconsideration we

O R D E R

That the Examiner's discovery rulings are modified as described in the body of this Order.

Dated at Augusta, Maine this 14th day of November, 1997.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Hunt